

Judge Marsha J. Pechman

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON

JAIME PLASCENCIA AND CECELIA  
PLASCENCIA,

Plaintiffs,

vs.

COLLINS ASSET GROUP, LLC AND  
DANIEL N. GORDON, PC D/B/A GORDON,  
AYLWORTH & TAMI, P.C.,

Defendants.

Civil Action No. 2:17-cv-01505-MJP

DEFENDANT COLLINS ASSET GROUP,  
LLC 'S OPPOSITION TO MOTION FOR  
RELIEF AND FOR LEAVE TO AMEND  
COMPLAINT

Noted on Motion Calendar:

November 30, 2018

**INTRODUCTION**

Defendant Collins Asset Group, LLC. ("CAG") respectfully requests that the Court deny Plaintiffs Jamie and Cecilia Plascencia's Motion for Relief from Case Schedule Deadline and for Leave to Amend Complaint. The Plascencias cannot show good cause for violating the scheduling order's deadline to amend pleadings, as required by Federal Rule of Civil Procedure 16. All of the facts underlying the proposed amendments were known to the Plascencias prior to the deadline. Failure to timely amend was the result of the Plascencias' carelessness and lack of due diligence.

Moreover, the proposed amendments would be futile, and thus even if the Plascencias could establish good cause, amendment should be denied pursuant to Rule 15. The court in the underlying state Collection Lawsuit has just granted summary judgment in full in favor of CAG,

1 signing a judgment for the full outstanding balance of the Note. The court specifically rejected  
2 the Plascencias' argument that collection of the note is time-barred, including the precise  
3 repudiation argument the Plascencias now seek to add to their complaint through amendment.

4 Moreover, as a matter of law, the Plascencias' repudiation theory is inapplicable to  
5 installment notes like the Note at issue here, so amendment to add this new legal theory would be  
6 futile. Likewise, CAG is indisputably the holder of the Note and thus entitled to enforce it.  
7 Thus, the Plascencias' proposed amendments regarding whether CAG is the holder in due course  
8 are irrelevant and futile—regardless, CAG can enforce the note, and any inadvertent  
9 mischaracterization in the state Collection Lawsuit complaint had no effect on the collectability  
10 of the Note or the legal rights and responsibilities of the parties.

## 11 II. AUTHORITY

### 12 A. The Plascencias Cannot Show Good Cause for Their Failure to Timely Amend As 13 Required by Rule 16

14 Federal District Courts are required to issue a scheduling order setting forth various  
15 deadlines for the administration of the case. *See* Fed R. Civ. P. 16(b). Among other things, the  
16 scheduling order “must limit the time to . . . amend the pleadings[.]” Fed R. Civ. P. 16(b)(3)(A).

17 “A schedule may be modified only for good cause and with the judge’s consent.” Fed R.  
18 Civ. P. 16 (b)(4). “Mere failure to complete discovery within the time allowed does not  
19 constitute good cause for an extension or continuance.” LCR 16(b)(5).

20 Where a party seeks to amend a pleading after the scheduling order’s deadline has  
21 passed, the propriety of amendment is evaluated under Rule 16’s “good cause” standard. *Ellis v.*  
22 *JPMorgan Chase & Co.*, No. 16-17005, 2018 U.S. App. LEXIS 24379, at \*4 (9th Cir. Aug. 28,  
23 2018) (“Because Appellants’ request for leave to amend was untimely under the district court’s  
24 case management order, Appellants were required to establish “good cause” for their delay.”);  
25 *Johnson v. Mammoth Recreations*, 975 F.2d 604, 607-08 (9th Cir. 1992) (“Once the district court  
26 had filed a pretrial scheduling order pursuant to Federal Rule of Civil Procedure 16 which  
27 established a timetable for amending pleadings that rule’s standards controlled.”).

Amendment is only permitted pursuant to Rule 16 if the party could not have timely

1 amended despite exercising due diligence. *Johnson*, 975 F.2d at 609. Rule 15’s liberal standard  
2 for amendment is not applicable once the deadline to amend has passed:

3 A court's evaluation of good cause is not coextensive with an inquiry into the  
4 propriety of the amendment under . . . Rule 15. Unlike Rule 15(a)’s liberal  
5 amendment policy which focuses on the bad faith of the party seeking to interpose  
6 an amendment and the prejudice to the opposing party, Rule 16(b)'s “good cause”  
standard primarily considers the diligence of the party seeking the amendment.  
*The district court may modify the pretrial schedule if it cannot reasonably be met  
despite the diligence of the party seeking the extension.*

7 *Id.* (internal citations and quotations omitted) (emphasis added).

8 “Moreover, carelessness is not compatible with a finding of diligence and offers no  
9 reason for a grant of relief.” *Id.*

10 Here, the deadline for amendment of pleadings was February 23, 2018. The Plascencias  
11 are now more than nine months beyond that deadline and cannot show good cause to amend at  
12 this late date.

13 In an apparent attempt to show their diligence, the Plascencias offer a lengthy recital of  
14 the discovery process, detailing their purportedly diligent efforts to conduct discovery. While  
15 this one-sided account is rife with inaccuracies and mischaracterizations, ultimately that is beside  
16 the point. Rule 16 does not require a *general* showing of diligence; rather, to establish the  
17 requisite good cause, the Plascencias must show that the *specifically proposed amendments*  
18 could not have been added at an earlier date despite due diligence. They have not, and cannot,  
19 make this showing.

20 While the Plascencias’ blow-by-blow of discovery purports to show they have *generally*  
21 been diligent in litigating this case, it utterly fails to address the real issue: why the *specific*  
22 amendment they now propose could not have been made before the scheduling order’s deadline.  
23 In reality, all of the facts and legal theories the Plascencias propose to add were, or should have  
24 been, known to them prior to the February 23, 2018 deadline to amend. Therefore, they cannot  
25 show good cause to amend nine months later.

26 The Plascencias’ most significant proposed amendment is the addition of a new legal  
27 theory: that by allowing their home to be foreclosed upon and failing to make installment

1 payments, the Plascencias repudiated their obligation to pay on the Note. *See* Second Amended  
2 Complaint for Violations of 15 USC 1692 and RCW Chapters 19.16 and 19.86 et seq.  
3 (“Proposed Amended Complaint”) ¶¶ 25, 26, 49(b), 53-55, 88-91, attached to the Declaration of  
4 Vincente Omar Barraza in Support of Motion for Relief from a Deadline and to Amend  
5 Complaint (“Barraza Decl.”) as Exhibit D. According to the Plascencias, this transformed the  
6 Note into a *demand* note, which was immediately collectible in full, meaning that statute of  
7 limitations began to run from the date of repudiation. *See id.* However, this theory (which is  
8 wholly without legal basis, as set forth below) is based entirely upon facts *known to the*  
9 *Plascencias when this action was commenced*. Since 2010 when the foreclosure took place, the  
10 Plascencias have known that they had ceased making installment payments on the note and that  
11 they had allowed their home to be foreclosed upon. No new facts uncovered since the passage of  
12 the deadline to amend have suddenly made this theory more viable. Rather, the Plascencias have  
13 merely assigned new legal significance to facts long known to them.

14 To the extent this theory has any merit, the Plascencias’ failure to include it in their  
15 original complaint, or to add it before the deadline to amend, was the result of their own  
16 carelessness. “[C]arelessness is not compatible with a finding of diligence and offers no reason  
17 for a grant of relief.” *Johnson*, 975 F.2d at 609. Because with due diligence the Plascencias  
18 could have timely amended their complaint to include this repudiation theory, they cannot show  
19 good cause to allow amendment at this late date, as required by Rule 16. *Id.*

20 Likewise, the Plascencias cannot show good cause for their other proposed amendments,  
21 which are also based upon facts that have been known to Plascencias since before the deadline to  
22 amend.

23 The Plascencias propose to add additional details about the underlying notes, deeds of  
24 trust, mortgages, original lenders, and loan servicers. *See* Proposed Amended Complaint,  
25 Barraza Decl. Ex. D., ¶¶ 16, 23. However, the Plascencias were parties to these loans and have  
26 been aware of their details, including the related notes and deeds of trust documents, lenders, and  
27 servicers, since originally borrowing in 2006. Thus, there is no reason these allegations could

1 not have been added prior to amendment deadline.

2 The Plascencias now wish to include allegations that their last payment on the note was  
3 made in 2009. *See id.* ¶ 20. However, since it was the Plascencias who made the payment,  
4 allegedly in 2009, they should have been aware of this fact for some nine years.

5 The Plascencias' proposed amendments also include additional allegations about the  
6 substance and dates of communications they received and sent regarding the Note. *See id.* ¶¶  
7 27, 29, 33, 37, 41, 42, 68(a)-(c), 85(c), 93(b); However, all of these communications took place  
8 prior to commencement of this lawsuit, so the Plascencias clearly could have added any new  
9 facts about them before the deadline to amend had passed.

10 Finally, the Plascencias seek to add allegations about the substance of the complaint in  
11 the Collection Lawsuit. *See id.* ¶¶ 52, 68(d)-(i), 80-83, 85(a). However, that lawsuit was  
12 commenced in 2017, *id.* ¶ 46, *before the Plascencias filed this lawsuit*. Thus, the Plascencias  
13 were aware of the contents of the Collection Lawsuit complaint long before the deadline to  
14 amend had passed.

15 Because all of the facts underlying the Plascencias' proposed amendments were known to  
16 them prior to the amendment deadline, they cannot show that these amendments could not have  
17 been timely made despite due diligence. *Johnson*, 975 F.2d at 609. Accordingly, the Plascencias  
18 cannot show good cause to modify the scheduling order's deadline for amendment, as required  
19 by Rule 16. Therefore, their motion must be denied.

20 **B. Even if Amendment Were Permitted by Rule 16, It Is Barred as Futile**

21 As set forth above, the Plascencias cannot satisfy the Rule 16's good cause requirement,  
22 and thus amendment must be denied. However, even if the Plascencias could establish good  
23 cause to amend nine months after the deadline, they must still obtain the Court's leave pursuant  
24 to Rule 15. *See Fed. R. Civ. P. 15(a)(2)*.

25 While leave is generally freely given when "when justice so requires," *id.*, amendment  
26 may nonetheless be denied if it would be futile. *Smith v. Constellation Brands, Inc.*, 725 F.  
27 App'x 504, 507 (9th Cir. 2018).

1 The court in the Collection Lawsuit has just granted summary judgment in full in favor of  
2 CAG, signing a judgment for the full amount prayed for in the complaint and dismissing the  
3 Plascencias defenses, including statute of limitations. This clearly suggests that the Plascencias'  
4 legal theories, including those addressed by the proposed amendments, are without merit, and  
5 thus amendment would be futile. Moreover, because these issues have been decided against the  
6 Plascencias in another legal action involving the same parties, they will be collaterally estopped  
7 from relitigating those issues here.

8 **1. Repudiation**

9 As explained above, the Plascencias seek to add a new legal theory through amendment:  
10 that they effectively repudiated their obligations on the Note, which, combined with their failure  
11 to make installment payments, constituted a total breach. According the Plascencias, this total  
12 breach converted the Note from an installment note to a demand note, meaning that the statute of  
13 limitations began to run on the entire outstanding balance at the time of repudiation in 2010. The  
14 Plascencias conclude that, because collection of the note was time-barred when Defendants  
15 began their collection efforts, Defendants violated the Washington Consumer Protection Act and  
16 the federal Fair Debt Collection Practices Act. However, the state court in the collection action  
17 has rejected this argument, finding that the Note is not time-barred.

18 In support of this legal theory, Plaintiffs rely upon *Colwell v. Eising*, specifically noting  
19 that the court in that case relied upon Restatement (Second) of Contracts § 253. Proposed  
20 Amended Complaint, Barraza Decl. Ex. D, ¶ 54 (citing *Colwell v. Eising*, 118 Wn.2d 861, 868,  
21 827 P.2d 1005, 1009 (1992)). However, unlike the instant matter, *Colwell* did not involve an  
22 installment promissory note—a crucial distinction. As *Colwell* notes, pursuant to Restatement  
23 (Second) of Contracts § 253, generally “repudiation following partial breach by non-performance  
24 is to be treated as a total breach.” *Id.* at n.4. However, this rule is inapplicable to installment  
25 promissory notes, like the Note at issue here. Rather Restatement (Second) of Contracts § 243  
26 governs installment notes:

27 Where at the time of the breach the only remaining duties of performance are  
those of the party in breach and are for the payment of money in installments not

1 related to one another, *his breach by non-performance as to less than the whole,*  
2 *whether or not accompanied or followed by a repudiation, does not give rise to a*  
3 *claim for damages for total breach.*

4 Restat 2d of Contracts, § 243(3) (2nd 1981) (emphasis added). The Restatement offers a further  
5 illustration to clarify this rule:

6 A borrows \$10,000 from B and promises to repay with interest in ten monthly  
7 installments. A unjustifiably fails to pay the first four installments. B has a claim  
8 against A merely for damages for partial breach for non-payment of the four  
9 unpaid installments. The result is the same even if A repudiates by telling B that  
10 he will not make the payments.

11 *Id.*, Illustration 4.

12 Here, “the only remaining duties of performance” is the Plascencias’ duty to make  
13 installment payments. *Id.* Thus, the Plascencias’ failure to make installment payments, even if  
14 accompanied by repudiation, did not constitute a breach of their obligations to make future  
15 installment payments. Rather, any cause of action for future payment only accrues as each  
16 payment becomes due. That is, the statute of limitations runs for each installment payment  
17 individually. Because the cause of action for future payments did not accrue at purported  
18 repudiation<sup>1</sup>, the statute of limitations did not begin to run on the portion of the Note that was not  
19 yet overdue. Indeed, the court in the underlying Collection Lawsuit specifically rejected the  
20 Plascencias’ identical repudiation argument, holding that collection on the Note is not time-

21 <sup>1</sup> CAG disputes that the Plascencias ever repudiated their obligations under the Note. Repudiation is defined as

22 (a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that  
23 would of itself give the obligee a claim for damages for total breach under § 243, or

24 (b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform  
25 without such a breach.

26 Restat 2d of Contracts, § 250.

27 The Plascencias do not allege that they ever made any statement that they intended to breach their entire  
obligation under the Note. Merely missing installment payments and allowing their home to be foreclosed upon is  
not a “voluntary affirmative act” that rendered the Plascencias unable or apparently unable to make future  
installment payments. Foreclosure extinguished the Note’s security, making it an unsecured promissory note.  
However, foreclosure had no effect on the Plascencias obligation or ability to make installment payments on that  
Note. Likewise, defaulting on some installment payments did not render the Plascencias unable to make future  
payments. They could have resumed payments on the Note at any time.

Subpart (b) is not intended to apply to the failure to make payment; rather, it would apply where the seller of  
breached a contract for the sale of nonfungible goods by selling those goods to another buyer—thereby rendering  
performance impossible.

1 barred.

2 Because the Plascencias' repudiation theory is inapplicable to the Note at issue,  
3 amendment to add this theory would be futile and should therefore be denied.

4 **2. Holder in Due Course**

5 The Plascencias further seek to amend their complaint to add allegations that CAG was  
6 not a holder in due course of the Note, as alleged in the Collection Lawsuit complaint. The  
7 Plascencias allege that this alleged misstatement somehow affects CAG's ability to collect on the  
8 note. However, it is undisputed that CAG is the Note's *holder*. As the holder, CAG is entitled to  
9 enforce the note. *Fed. Fin. Co. v. Gerard*, 90 Wn. App. 169, 177, 949 P.2d 412, 415 (1998);  
10 *Bavand v. OneWest Bank*, 196 Wn. App. 813, 844–45, 385 P.3d 233, 249 (2016), as modified  
11 (Dec. 15, 2016). CAG has the legal authority to enforce the note, which is the only salient issue.  
12 Thus, to the extent the Collection Lawsuit complaint incorrectly characterizes CAG as the holder  
13 in due course, that drafting error is immaterial and has no bearing the elements of the  
14 Plascencias' causes of action in this case. Regardless, CAG has the legal authority to enforce the  
15 Note, so any misstatement about its status as holder in due course did not mislead the Plascencias  
16 about CAG's authority to collect on the Note. As such, such a misstatement would not constitute  
17 a violation of the CPA or FDCPA. Thus, the Plascencias proposed amendment is futile.

18 **III. CONCLUSION**

19 For the foregoing reasons, CAG respectfully requests that the Court deny Plaintiffs'  
20 Motion for Relief from Case Schedule Deadline and for Leave to Amend Complaint.

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1 DATED this 28th day of November, 2018

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## DECLARATION OF SERVICE

I hereby certify that on November 28, 2018 I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

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